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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1993

FLORA SULLINS,

Petitioner,

v.

DONNA E. SHALALA, Secretary of Health and Human Services

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

Whether the Court of Appeals properly refused to consider material evidence that was presented to the Appeals Council but not before the administrative law judge in making its determination of whether substantial evidence exists to support the Secretary's decision denying petitioner disability and supplementary security income benefits?

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For the Eighth Circuit

Flora Sullins, by and through her attorney of record, Anthony W. Bartels, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 25 F.3d 601, and is reproduced in the Appendix at App. 1a.

The opinion of the United States District Court for the Eastern District of Arkansas is reproduced in the Appendix at App. 9a.

The opinion of the Appeals Council is reproduced in the Appendix at App. 15a.

The opinion of the Administrative Law Judge is reproduced in the Appendix at App. 18a.

The court of appeals' order denying the petition for rehearing is reproduced in the Appendix at App. 27a.

JURISDICTION

The court of appeals entered its judgment on May 18, 1994. The court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on June 23, 1994.

This petition is timely filed within ninety (90) days of June 23, 1994 pursuant to Supreme Court Rule 13.1 and 13.4.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), provides in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . . Such action shall be brought in the district court of the United States . . . . The court . . . may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . .

20 C.F.R. § 404.970(b) provides:

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.[1]

STATEMENT OF THE CASE

Flora Sullins, petitioner, sought judicial review of the decision of the Secretary of Health and Human Services denying her application for disability insurance benefits and supplemental security income. The jurisdiction of the district court was invoked under Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). The district court granted the Secretary's motion for summary judgment. The court of appeals, assuming jurisdiction under 28 U.S.C. § 1291, affirmed the district court.

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[1]This regulation pertains to applications for disability insurance benefits. A nearly identical regulation, 20 C.F.R. § 416.1470(b), applies to applications for supplementary security income.

A. Administrative History

Sullins applied for disability insurance benefits and supplemental security income (SSI) in November 1990, alleging an inability to work since February 1990 due to back pain, headaches, and foot and female problems. Although Sullins did not specifically allege any mental impairments in her application, she testified at the hearing that she has problems with her "nerves," for which she takes an antidepressant, and that she gets anxious and upset with people and has seen a psychiatrist. Medical reports submitted to the administrative law judge (ALJ) show that one treating physician prescribed Valium, Sinequan, and Amitriptylin (Elavil) for anxiety and depression, while another noted that Ms. Sullins was "depressed" and prescribed Trazodone.

The ALJ found that Sullins could not perform her past relevant work due to chronic lumbosacral sprain, but that she has the residual functional capacity to perform work that does not involve heavy lifting or standing, sitting, walking, or climbing for prolonged periods of time. App. 25a. Considering Sullins' age, education, previous work experience, and residual functional capacity, as well as vocational testimony offered at the hearing, the ALJ concluded that Sullins could perform jobs that existed in significant numbers in the economy, such as assembly line worker and cashier, and therefore was not disabled within the meaning of the Social Security Act. *Id.* The ALJ noted Sullins' testimony that she suffers from anxiety and depression, but he found no signs or symptoms of an ongoing psychiatric mental impairment. His opinion reads in part:

> The claimant testified that she has problems with anxiety and depression. However, there are no signs or symptoms of an ongoing

> psychiatric impairment. There is also no showing that the claimant alleged any difficulty with her nerves when she was examined by any of her treating physicians, nor is there a record of a mental impairment being identified or considered for diagnosis or treatment. There is no showing that she has been seen by a mental health professional or been hospitalized for psychiatric impairment. The claimant testified she took Amitriptyline for her nerves; however, this medication was in fact prescribed for her alleged headaches.

Id. at 22a-23a. His decision denying Sullins' claim was issued on September 25, 1991.

On November 15, 1991, pursuant to 20 C.F.R. § 404.967, Sullins filed a request for review of the ALJ's decision with the Appeals Council. She submitted additional medical evidence with the request, including a report by Dr. W. Gerald Fowler, a psychiatrist, dated October 12, 1991. Dr. Fowler diagnosed Sullins as suffering from several longstanding mental impairments, many of which apparently were the result of abusive relationships with her past two husbands. App. 3a. Considering the combination of these impairments, Dr. Fowler concluded that Sullins could not carry out simple instructions in a reasonable time, could not get along adequately with co-workers and supervisors, and could not maintain attendance for low stress work. He indicated that her condition had not improved significantly within the twelve months prior to October 1991. *Id.* Dr. Fowler's report was submitted to the Appeals Council pursuant to 20 C.F.R. § 404.970(b), which provides that

> [i]f new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to

> the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

The Appeals Council denied Sullins' request for review on May 20, 1992, finding that Dr. Fowler's report was not relevant to the issue of whether she was disabled on or before September 25, 1991, the date of the ALJ's decision. App. 17a.

B. Proceedings Below

Sullins appealed the Secretary's decision to district court, which granted the Secretary's motion for summary judgment. The district court rejected Sullins' argument that the hypotheticals posed to the vocational expert were flawed because they did not include Sullins' mental impairments and found that the Secretary's decision was supported by substantial evidence on the record as a whole. App. 12a. The court considered but gave little weight to Dr. Fowler's report in its review of the Secretary's decision, concluding without explanation that the report was "irreconcilable with" and "contradicted by" the records of Sullins' treating physicians. *Id.* at 13a.

On appeal to the Eighth Circuit, Sullins urged that the case be remanded to obtain vocational expert testimony that would take into account her mental impairments identified

in Dr. Fowler's report. The court of appeals described Dr. Fowler's report as "concededly material," *id.* at 7a n.6, and "evidence that might well have, had it been timely introduced, established that Sullins was in fact disabled," *id.* at 4a. It concluded, however, that the ALJ did not err in failing to ask the vocational expert a hypothetical question that included Sullins' mental impairments because Sullins had not presented any evidence of such impairments to the ALJ, nor had she alleged a disabling mental impairment in her application for disability benefits or offered a mental impairment as a basis for disability at her hearing. *Id.* at 6a-7a.[2] The court refused to consider Dr. Fowler's report in its review of the Secretary's decision because it considered the administrative record closed after the ALJ's decision. *See id.* at 7a ("Due to the report's untimeliness . . . this information was not part of the medical record that formed the basis of the ALJ's decision."); *id.* at 7a n.6 ("[Sullins] had full opportunity to develop the record as to any mental impairments before the administrative record was closed, but failed to do so."). The court declined to remand the case because it found that Sullins had failed to show good cause for not incorporating the report into the administrative record before the ALJ. *Id.*

REASONS FOR GRANTING THE PETITION

As the Eleventh Circuit acknowledged in *Keeton v. Department of Health and Human Services*, 21 F.3d 1064, 1066 (11th Cir. 1994), the circuits are split on what evidence constitutes the administrative record the courts are to review

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[2]This last observation is curious in view of the ALJ's extended discussion of whether Sullins indeed was suffering from a disabling mental impairment. *See* App. 22a-23a. Obviously, the ALJ considered Sullins' testimony about her anxiety and depression to have sufficiently raised the mental impairment issue.

when the Appeals Council denies review. Some have adopted the rule that when the decision of the ALJ becomes the final decision of the Secretary, the adminstrative record consists only of the evidence presented to the ALJ. Others have held that the record also includes any additional evidence submitted to the Appeals Council. This conflict is escalating, as demonstrated not only by the split among the circuits, but also by the differences between the decision below and prior Eighth Circuit rulings. Thus, the need for guidance from this Court is crucial. This case presents a timely opportunity to resolve these conflicts by providing guidance regarding the contents of the administrative record in Social Security cases for purposes of judicial review.

I. The Decision of the Court of Appeals Aggravates the Existing Split of Authority in the Circuits

The Eighth Circuit's decision in *Sullins* not to consider material evidence first submitted to the Appeals Council in its substantial evidence review adds to the conflict among the circuits over the contents of the administrative record for purposes of judicial review. There is no realistic prospect for resolution of this split without a decision by this Court.

Only the "final" decision of the Secretary in Social Security cases is subject to judicial review. 42 U.S.C. § 405(g). If a claimant is not satisfied with the decision of the ALJ, he or she can request review of that decision by the Appeals Council. 20 C.F.R. § 404.967. When the Appeals Council grants review, the Council's decision becomes the final decision of the Secretary. 20 C.F.R. § 404.981. When the Appeals Council denies review, the decision of the ALJ becomes the final decision of the Secretary. *Id.* § 404.955, 404.981. The scope of judicial review over the Secretary's decision is limited to whether her factual findings are supported by substantial evidence and whether she applied the proper legal standards. 42 U.S.C. § 405(g).

The regulations provide that additional evidence can be submitted to the Appeals Council before it decides whether to grant or decline review. 20 C.F.R. § 404.970(b). The Appeals Council must consider that evidence if it is new, material, and relates to the period on or before the ALJ's decision—even if the Council ultimately declines to review the ALJ's decision. When the Appeals Council refuses to consider such evidence, that decision also is subject to judicial review because it amounts to an error of law. *Keeton v. Department of Health and Human Services*, 21 F.3d 1064, 1066 (11th Cir. 1994); *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990).

Two circuits have held that the administrative record does not include evidence first submitted to the Appeals Council when the Council declines to review the ALJ's decision. *See Cotton v. Sullivan*, 2 F.3d 692 (6th Cir. 1993); *Eads v. Secretary of the Dept. of Health and Human Svcs.*, 983 F.2d 815 (7th Cir. 1993). Indeed, the Seventh Circuit recently stated that evidence submitted for the first time to the Appeals Council cannot be used as a basis for finding reversible error, even if that evidence is "technically a part of the administrative record." *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). The contrary view has been taken by the Fourth Circuit in *Wilkins v. Secretary, Dept. of Health and Human Svcs.*, 953 F.2d 93 (4th Cir. 1991) and the Eleventh Circuit in *Keeton*, the most recent decision on the question. These courts have considered new and material evidence first presented to the Appeals Council in their substantial evidence review, even though the Appeals Council has declined review.

The *Sullins* result has compounded the uncertainty over this question by more than simply supporting one side rather than the other. As the Eleventh Circuit observed in *Keeton*, the law was well established in the Eighth Circuit that the administrative record for review includes new and material evidence submitted to the Appeals Council. *See*

Richmond v. Shalala, 23 F.3d 1441 (8th Cir. 1994); *Riley v. Shalala*, 18 F.3d 619 (8th Cir. 1994); *Nelson v. Sullivan*, 966 F.2d 363 (8th Cir. 1992); *Browning v. Sullivan*, 958 F.2d 817 (8th Cir. 1992). *Sullins* turns these cases on their heads.

In *Richmond* the court considered in its substantial evidence review the report of a one-time consulting physician submitted to the Appeals Council after the ALJ denied benefits. The court stated that "[w]hen new evidence is submitted to the appeals council and the appeals council has considered the evidence, this court then determines 'whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ's decision.'" 23 F.3d at 1444 (quoting *Nelson*, 966 F.2d at 366).[3] Similarly, in *Riley*, the court explained that once the Appeals Council has considered the newly submitted evidence, "our role is limited to deciding whether the administrative law judge's determination is supported by substantial evidence on the record as a whole, including the new evidence submitted after the determination was made." 18 F.3d at 622. The rule was stated most clearly in *Nelson*, when the court wrote,

> [w]hen new and material evidence is submitted to the Appeals Council . . . . [t]he newly submitted evidence is to become part of what we will loosely describe here as the "administrative record," even though the evidence was not originally included in the ALJ's record. If the Appeals Council does not consider the new evidence, a reviewing court may remand the case to the Appeals Council if the evidence is new and material. If, as here, the Appeals Council considers the new evidence but declines to review the case, we

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[3]The decision in *Richmond* was filed exactly one week prior to the decision in *Sullins*.

> review the ALJ's decision and determine whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ's decision.

966 F.2d at 367 (citations and footnote omitted); *see id.* at 367 ("Based upon the evidence presented at the hearing *and submitted to the Appeals Council*, we find the ALJ's decision that Nelson is not disabled is supported by substantial evidence on the record as a whole.") (emphasis added). Finally, in *Browning*, after explaining why it did not have jurisdiction to review the Appeals Council's decision on the merits when the Council had considered new evidence and then denied review, the court stated that "the relevant issue [on appeal] becomes whether the new evidence Browning submitted to the Appeals Council changes our conclusion that there is substantial evidence to support the ALJ's final decision." 958 F.2d at 823.

Thus, the result in *Sullins* not only conflicts with decisions in the Fourth and Eleventh Circuits, but also is directly opposite to prior Eighth Circuit rulings. The Court should grant certiorari to review these important conflicts.

II. The Decision of the Court of Appeals Is Erroneous

The court of appeals should have treated Dr. Fowler's report as part of the administrative record and determined whether, in light of that report, substantial evidence on the record as a whole supported the Secretary's decision. Yet, despite describing the report as "rather compelling evidence that Sullins currently suffers from a number of mental impairments," App. 7a, and "evidence that might well have, had it been timely introduced, established that Sullins was in

fact disabled," *id.* at 4a, the court refused to consider the report because it was not submitted prior to the ALJ's decision. *See* App. 3a ("Dr. Fowler's psychiatric report . . . was issued too late to be considered"); *id.* at 4a (Dr. Fowler's report was could have established that Sullins was disabled "had it been timely introduced"); *id.* at 7a ("[the] consultative psychiatric report prepared by Dr. Fowler . . . arrived too late to be considered"); *id.* ("Due to the report's untimeliness . . . this information was not part of the medical record that formed the basis of the ALJ's decision."); *id.* at 7a n.6 ("[Sullins] had full opportunity to develop the record as to any mental impairments before the administrative record was closed, but failed to do so.").[4] This result is clearly at odds with the the applicable regulations.

The two circuits which have held that the administrative record does not include evidence submitted to the Appeals Council have based their decisions on the rationale that when the Appeals Council denies review, the ALJ's decision becomes the "final decision" of the Secretary reviewed by the courts. *See Cotton*, 2 F.3d at 695-96; *Eads*, 983 F.2d at 817-18. It would not be proper, so the argument goes, for a court to evaluate an ALJ's decision based evidence not before the ALJ, because that would require the court to weigh the evidence in the first instance, rather than limiting itself to reviewing the evidentiary determinations of the factfinder. *Eads*, 983 F.2d at 817-18. Thus, "courts may not reverse an administrative law judge's decision on the basis of evidence first submitted to the Appeals Council." *Id.* at 818. This reasoning is flawed, however, because it wrongly assumes that the Secretary has not considered this evidence and weighed it against the record as a whole during the administrative process.

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[4]By contrast, the district court in *Sullins* considered but gave little weight to Dr. Fowler's report in its review of the Secretary's decision, concluding without explanation that the report was "irreconcilable with" and "contradicted by" the records of Ms. Sullins' treating physicians.

Under 20 C.F.R. § 404.970(b), once the Appeals Council determines that newly submitted evidence is material and relates to the period on or before the ALJ's decision, it *must* consider the evidence. *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990). The regulation clearly suggests that the "entire record" now includes the additional evidence, and it requires the Appeals Council (*i.e.*, the Secretary) to weigh that evidence against the rest of the record *even if it ultimately refuses to review the ALJ's decision. See Riley*, 18 F.3d at 622 (noting with approval the Appeal Council's thorough consideration of additional evidence despite the Council's refusal to review the ALJ's decision); *Wilkins v. Secretary, Dept. of Health and Human Svcs.*, 953 F.2d 93, 95 (4th Cir. 1991) ("[T]he regulation sets forth a mandatory rule that the Appeals Council must consider new and material evidence relating to the period prior to the ALJ decision in determining whether to grant review, even though it may ultimately decline review.").

The decision of the Secretary is not "final" until the Appeals Council either rules on a case it has accepted for review or denies review. 20 C.F.R. § 404.958. When a claimant seeks review of an ALJ's decision and submits additional evidence to the Appeals Council under section 404.970(b), the Secretary must consider that evidence before denying review. At the time the evidence is offered the administrative process is continuing, the record is still open, and the Secretary's decision is not yet final. *See Williams*, 905 F.2d at 216 n.6. "Each successive appeal contributes to the administrative process and . . . the administrative record." *Keeton*, 21 F.3d at 1067. Because the Secretary's own regulation expressly requires full consideration of evidence first submitted to the Appeals Council even when review is denied, the Secretary's "final" decision includes, in effect, both the ALJ's decision *and* the Appeals Council's appraisal of the newly submitted evidence. It is wrong, then, for a court to disregard that evidence because of the mistaken

notion that it would otherwise have to assume the role of the front-line factfinder and consider the evidence in the first instance. *See Riley*, 18 F.3d at 622 (noting that when the Appeals Council considers newly submitted evidence and explains that review is denied despite the evidence, "remand for consideration of the reports in the first instance is inappropriate"). That is why the Eleventh Circuit in *Keeton* resolved that "new evidence first submitted to the Appeals Council is part of the administrative record that goes to the district court for review when the Appeals Council accepts the case for review as well as when the Council denies review." 21 F.3d at 1067. *See Wilkins*, 953 F.2d at 96 (explaining that the court must review the whole record, including the new evidence, to determine whether substantial evidence supports the Secretary's findings).

There is another misstep in the *Sullins* decision. The *Sullins* court described Dr. Fowler's report as "concededly material," App.7a n.6, and "evidence that might well have, had it been timely introduced, established that Sullins was in fact disabled," *id.* at 4a. Given these determinations, *Sullins* should have been an easy case. Since Dr. Fowler's report apparently satisfied the criteria for new and material evidence under section 404.970(b), the Appeals Council erred by refusing to consider it relevant.[5] That would

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[5]Medical evidence obtained after an ALJ decision is "material" if it relates to the claimant's condition on or before the date of the ALJ's decision. *Williams*, 905 F.2d at 216. Moreover, "[t]he timing of the examination is not dispositive of whether evidence is material. If it were, all evidence obtained after the date of an ALJ decision would fail to meet the new and material standard." *Id.*

Dr. Fowler's report was issued on October 12, 1991, about three weeks after the ALJ's decision on September 25, 1991. Ms. Sullins had to show that she was disabled on or before the ALJ's decision to qualify for SSI benefits. Since she last met the special earnings requirements for disability benefits on June 30, 1990, she needed to establish a disability by that date in order to be entitled to Title II benefits. As the *Sullins* court noted, Dr. Fowler found that Ms. Sullins' suffered from a number of disabling mental impairments, many of which were the result of past

warrant a remand under *Williams*, 905 F.2d 214, for proper consideration of the wrongly excluded evidence. In *Williams* the Eighth Circuit returned the case to the Secretary after concluding that a doctor's report submitted to the Appeals Council after the ALJ's decision was new and material under section 404.970(b), and the Appeals Council had erroneously refused to consider it. *Accord Nelson v. Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992) ("If the Appeals Council does not consider the new evidence, a reviewing court may remand the case to the Appeals Council if the evidence is new and material.").[6]

The *Sullins* decision never mentions *Williams*. The court declined to remand the case because it found that Ms. Sullins had failed to show good cause for not incorporating the report into the administrative record before the ALJ. App. 7a n.6. The court mistakenly believed that a remand could only be effected under 42 U.S.C. § 405(g), which grants reviewing courts authority to order the Secretary to consider additional evidence upon a showing that the new evidence is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. Section 405(g) sets forth the conditions for a remand when new evidence is first introduced at the judicial level. By contrast,

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abusive relationships with her first two husbands, and that her condition had not improved significantly within the previous year. *Sullins*, at *1. This explicitly covers a time period preceding the ALJ's decision by almost one year and, given the nature and causes of the diagnosed impairments, obviously relates to the period prior to June 30, 1990. Thus, the court apparently concluded—contrary to the Appeals Council's finding—that Dr. Fowler's report related to the relevant periods prior to the ALJ's decision.

[6]Under Eighth Circuit law prior to *Sullins*, the Appeals Council's failure to consider the evidence did not preclude the court from considering Dr. Fowler's report, because "such material must still be included in the full certified administrative record, and the reviewing court must ultimately determine, after giving due deference to the agency's views, what constitutes the record for purposes of applying the substantial evidence test under 42 U.S.C. § 405(g)." *Browning*, 958 F.2d at 823 n.4.

a remand under *Williams* ensures that the Secretary complies with her own regulation governing the consideration of new and material evidence submitted to the Appeals Council. *See Browning v. Sullivan*, 958 F.2d 817, 822-23 (8th Cir. 1992) (explaining that although a reviewing court may not review the Appeals Council's nonfinal administrative decision to deny review of the ALJ's decision, it does have jurisdiction to review whether the Appeals Council has complied with the procedural requirements of the regulations). Since 20 C.F.R. § 404.970(b) *does not* require the claimant to show good cause for failing to submit the evidence before the ALJ's decision, the *Sullins* court wrongly imposed the good cause requirement as a condition for remand. *See Wilkins*, 953 F.2d at 96 n.3 (distinguishing remand under section 405(g), which requires good cause for failing to present the evidence earlier, and submission of new evidence to the Appeals Council, which has no good cause requirement).

This error followed from the court of appeals' refusal to consider Dr. Fowler's report as part of the administrative record on review. Treating the administrative record as closed after the ALJ's decision is inconsistent with the Secretary's own regulations. This Court should grant Sullins' petition to resolve the conflict in the circuits and correct the Eighth Circuit's errors.

III. The Question Presented is Important

Closing the administrative record after the ALJ's decision for purposes of judicial review not only fails to comprehend the Social Security regulations, it also penalizes claimants who either are unable to obtain adequate medical treatment or evaluations before the ALJ's decision or are unaware of the full extent of their impairments when first filing their application for benefits. It is especially harsh for claimants like Sullins who suffer from mental impairments,

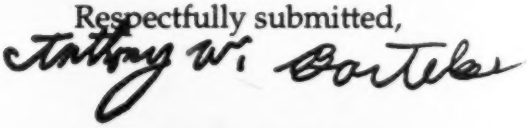
which often are denied or go undetected until late in the administrative process.

In sum, the authorities are in substantial disarray on a matter of importance to the courts, to the Social Security Administration, and to disability claimants. This case presents a rare opportunity for this Court to address the disputed issue and to bring much-needed certainty and uniformity to Social Security disability law. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93–2729

Flora Sullins,	*
	*
Appellant,	* Appeal From the
	* United States
v.	* District Court for
	* the Eastern District
Donna E. Shalala,	* of Arkansas.
Secretary of the	*
Department of Health	*
and Human Services,	*
	*
Appellee.	*

Submitted: February 16, 1994

Filed: May 18, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

HEANEY, Senior Circuit Judge.

Flora Sullins applied for disability insurance benefits (DIB) and Supplemental Security Income (SSI) in November 1990, alleging disability due to a back injury, foot and female problems, and headaches. Her claims were denied initially and upon reconsideration. She requested and was granted a hearing before an Administrative Law Judge (ALJ), who denied her claim in a written report and recommendation in September 25, 1991. The Appeals Council sustained the ALJ's decision, and Sullins subsequently sought review of the denial of her claim in federal district court. The district court granted the Secretary's motion for summary judgment and dismissed Sullins' claim. Sullins appeals and we affirm.

I.

Sullins is a forty–two–year old woman with a fifth grade education who has intermittently held a variety of jobs in the past. Her primary disability (back pain) is traceable to 1980 when, while working as a nurse's aid at a nursing home, she suffered a back injury when a 300–pound patient fell on her. She was treated at that time and was prescribed pain medication and muscle relaxants. From 1982 to 1985, she sought treatment from her family physician for recurring ailments apparently unrelated to her back injury. She received treatment three times thereafter before filing for disability on November 9, 1990—once in 1988 for a back injury and twice in 1990 for vaginal bleeding and weight control.

After filing for benefits and at the request of the Social Security office, Sullins saw Dr. James Smith in January 1991, at which time she complained of back pain, swelling in her feet, headaches and chest pain. Based on the examination, Dr. Smith concluded that Sullins was capable of working in a number of occupations. Ad. Tr. at 136. She was examined for back pain again in April 1991 by Dr. Ramon Lopez, an

orthopaedic specialist, who diagnosed her as having chronic lumbosacral strain.

Sullins' next comprehensive examination was by a psychiatrist, Dr. Gerald Fowler, on October 12, 1991—nearly a month after the ALJ issued his report and recommendation denying Sullins' disability benefits. Dr. Fowler found that Sullins suffered from a number of disabling mental impairments, many of which apparently were the result of past abusive relationships with her first two husbands. Among his findings were that Sullins could not maintain adequate attendance for a low stress job due to her preoccupation with pain and her numerous somatic complaints, her post-traumatic stress disorder, and her several phobias and panic disorder. Id. at 168. Dr. Fowler concluded that Sullins' mental impairments had not improved significantly within the past twelve months and were not expected to improve within the next year. Id.

The ALJ found that Sullins had not been engaged in substantial gainful activity since February 15, 1990, and that she last met the special earnings requirements for disability benefits on June 30, 1990. Based on Sullins' testimony and medical record—with the exception of Dr. Fowler's psychiatric report which was issued too late to be considered—the ALJ found that, although Sullins was unable to perform her past relevant work[1] and had no transferable skills, considered her age, education, previous work experience, and residual functional capacity, she nonetheless could perform jobs that existed in significant numbers in the economy (e.g., work as an assembly line worker or cashier). Id. at 22. Applying the factors set forth in Polaski v. Heckler, 739 F. 2d 1320, 1322 (8th Cir. 1984) (subsequent history omitted), the ALJ concluded that Sullins' subjective complaints of pain were not credible and that there were no signs of an ongoing mental impairment. Ad.

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[1]Sullins had worked as a waitress, cook, nurse's aide, janitor, machine operator, and truck driver

Tr. at 20, 22. The district court agreed, finding that there was substantial evidence on the record as a whole to support the ALJ's finding that Sullins was not disabled within the meaning of the Social Security Act.

II.

Sullins urges reversal of the district court's order, arguing the evidence on the record as a whole was not substantial to support the ALJ's finding that her subjective complaints of pain were not credible. Alternatively, she urges us to remand the case with instructions to obtain vocational expert testimony that sheds light on her mental impairments (as described in Dr. Fowler's psychiatric report)—evidence that might well have, had it been timely introduced, established that Sullins was in fact disabled. The facts of this case prevent us from doing either. The ALJ's findings as to both Sullins' allegations of pain and her mental impairments are sound.

We will affirm the district court's decision only if there is substantial evidence on the record as a whole to support the ALJ's findings. See, 42 U.S.C. § 405 (g); Smith v. Heckler, 735 F. 2d 312, 315 (8th Cir. 1984). When determining the credibility of a claimant's allegations of subjective pain, the ALJ must consider the claimant's prior work record, observations by third parties, and diagnoses by treating and examining physicians relating to such matters as (1) claimant's daily activities; (2) duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medications; (5) functional restrictions. Polaski, 739 F. 2d at 1322. Although an ALJ cannot disregard a claimant's subjective complaints of pain solely because the objective medical evidence does not fully support them, such complaints may be discounted if there are inconsistencies in the evidence as a whole. See id.; Prince v. Bowen, 849 F. 2d 283, 286 (8th Cir. 1990).

Sullins suffered an acute lumbosacral sprain in 1980 and 1988 as a result of a work–related injury as a nurse's aid for which she received pain medication. She sought treatment from 1982 to 1985 for a variety of problems, including osteoarthritis of the lumbar spine, rheumatoid arthritis, anemia, iron deficiency, and a corneal abrasion. The year of her alleged disability onset date, 1990, Sullins saw a physician only twice (once for vaginal bleeding and once for weight control), in spite of testifying to having "constant" back pain, with pain at ten, on a scale of ten, 99% of the time. Ad. Tr. at 40.

The only other visits that Sullins made to physicians occurred after she applied for disability benefits on November 9, 1990. In January 1991, she was examined by Dr. Smith at the request of the Social Security office. Dr. Smith reported that Sullins' lumbosacral spine showed "some minor early arthritic changes," however, nothing "other than . . . minimal changes." Id. at 136. He found no evidence of a slipped disc or any compromise of intervertebral spaces, and found Sullins' feet to be within normal limits of a person of her age and stature. Id. Based on objective evidence, he concluded that Sullins was capable of working in a number of occupations, that she had no problem sitting (although she would be limited in the number of hours that she could stand), and that she was able to lift and carry objects of up to fifteen to twenty pounds. Id. At the behest of her attorney, Sullins saw Dr. Lopez in April 1991. Dr. Lopez reported that examination of Sullins' cervical spine showed no pain on compression or traction; that she was able to make a fist, pinch, grasp, and hold a pencil; that there was no demonstrable weakness in her hands; and that examination of her musculoskeletal system (e.g., her shoulders, elbows, wrists, hips, knees, ankles, and feet) was "unremarkable with no areas of pain or tenderness." Id. at 139. Dr. Lopez concluded that she would not be able to do work activities that required prolonged sitting, standing,

walking, climbing, carrying, pushing or pulling. Id. Sullins sought additional treatment during this time from two other physicians, Drs. Grasse and Ducker, for back pain, headaches, and insomnia. Id. at 148–49, 151, 156.

Based on Sullins' medical records and testimony, the ALJ concluded that the severity of Sullins' allegations of pain were inconsistent with the level of medical evidence presented. Id. at 20. He found as well that her work history and daily living activities did not enhance her credibility. Id. We have carefully reviewed the record, and find that substantial evidence on the record as a whole supports the ALJ's decision. We will not disturb the decision of an ALJ who seriously considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain. Browning v. Sullivan, 958 F. 2d 817, 821 (8th Cir. 1992) (citing Dixon v. Sullivan, 905 F. 2d 237, 238 (8th Cir. 1990)).

As for Sullins' second contention, that the ALJ did not properly take into account her alleged mental impairments, we find that the ALJ did not err in failing to include a hypothetical question about her alleged mental impairments among the questions he asked of a vocational expert called to help determine the existence of other jobs in the economy that Sullins could perform. It is well settled that a hypothetical question posed to a vocational expert must fully set forth a claimant's impairments. Totz v. Sullivan, 961 F. 2d 727, 730 (8th Cir. 1992). Sullins, however, presented no evidence to support her allegation that she suffered from a disabling mental impairment prior to June 30, 1990, the date she last met the special earnings requirements for disability benefits.[2] There are no signs or symptoms of an

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[2]We note that Sullins was given ample opportunity at the hearing to raise the issue of her alleged mental impairments, but failed to do so. In concluding his questioning of the vocational expert, the ALJ specifically asked Sullins' attorney whether he had covered all of the factors relevant to Sullins' ability to perform other work. Neither Sullins nor her attorney raised the issue of mental impairments. See Ad. Tr. at 55–56.

ongoing psychiatric impairment in any of her medical records, nor is there any showing that Sullins was diagnosed with or received treatment by either a mental health professional or one of her treating physicians for a psychiatric impairment. Sullins testified that she took Amitriptyline for her nerves, Ad. Tr. at 42; however, this medication was apparently prescribed for headaches. We find it noteworthy that she did not allege a disabling mental impairment in her application for disability benefits,[3] see Smith v. Shalala, 987 F. 2d 1371, 1375 (8th Cir. 1993), nor did she offer such an impairment as a basis for disability at her hearing,[4] see Brockman v. Sullivan, 987 F. 2d 1344, 1348 (8th Cir. 1993).

The only medical evidence Sullins offered to support her claim of a disabling mental impairment was a consultative psychiatric report prepared by Dr. Fowler that arrived too late to be considered. Dr. Fowler examined Sullins on October 12, 1991—nearly a month after the ALJ issued his report and recommendation denying her disability benefits. The report, to be sure, is rather compelling evidence that Sullins currently suffers from a number of mental impairments.[5] Due to the report's untimeliness, however, this information was not part of the medical record that formed the basis of the ALJ's decision.[6] An ALJ ordinarily

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[3]In her application, Sullins alleged disability due to a back injury, female and foot problems, and headaches. Ad. Tr. at 62, 94, 120.

[4]The only testimony she offered as to her mental health was that her "nerves" bother her and that she can get anxious and upset with people. Ad. Tr. at 42–43.

[5]According to the report, Sullins' condition "had not improved significantly within the past 12 months and is not expected to improve significantly within the next 12 months." Ad. Tr. at 169.

[6]Section 205 (g) of the Social Security Act, 42 U.S.C. § 405 (g), grants reviewing courts the authority to order the Secretary to consider additional evidence, but "only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." The evidence in Dr. Fowler's report is concededly material; however, we find

has no obligation to investigate claims not presented at the time of the application for benefits and not offered at the hearing as a basis of disability. See, Smith, 987 F. 2d at 1375; Brockman, 987 F. 2d at 1348.

We find, in sum, that there is substantial evidence on the record as a whole to support the ALJ's finding that Sullins' subjective complaints of pain were inconsistent with her medical record. We find as well that there is substantial evidence to support the ALJ's conclusion that Sullins did not suffer from a disabling mental impairment (or any other disability) prior to June 30, 1990, the date by which she needed to establish a disability in order to be entitled to benefits. We express no disability in order to be entitled to benefits. We express no opinion, however, as to her eligibility for SSI benefits after June 30, 1990—an option that is not foreclosed by this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT

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that there was no good cause for Sullins' failure to incorporate it in the record. She had full opportunity to develop the record as to any mental impairments before the administrative record was closed, but failed to do so. See Smith, 987 F. 2d at 1375.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

FLORA M. SULLINS (SSN: 430–13–1477) — PLAINTIFF

V. — NO. B–C–92–55

DONNA E. SHALALA, Secretary of the Department of Health and Human Services, — DEFENDANT

MEMORANDUM AND ORDER

Plaintiff in this case has appealed the final decision of the Secretary of Health and Human Services to deny her claim for Disability Insurance benefits and Supplemental Security Income, based on disability. Both parties have moved for summary judgment. In this judicial review, the Court must determine whether there is substantial evidence in the administrative record to support the Secretary's decision. 42 U.S.C. § 405 (g) (1976 & Supp. V 1981).

This review function is extremely limited: The Court's function on review is to determine whether the Secretary's decision is supported by substantial evidence on the record as a whole. 42 U.S.C. § 405 (g). See also, Baugus v. Secretary of Health and Human Services, 717 F. 2d 443, 445 (8th Cir. 1983); McMillian v. Schweiker, 697 F. 2d 215, 220 (8th Cir. 1983). The Court must accept the agency's factual determinations and the reasonable inferences drawn from them if the record provides substantial evidence to support the findings and inferences. Russell v. Secretary of H.E.W., 540 F. 2d 353, 355 (8th Cir. 1976). Substantial evidence is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). McMillian v. Schweiker, supra.

The history of the administrative proceedings and the statement of facts reflected on pages one through eight of the defendant's Brief in Support of Motion for Summary Judgment, as stipulated to and supplemented by the plaintiff in her pleading filed November 9, 1992, are adopted and incorporated herein as if set out word for word by the Court.

Plaintiff, who is seeking benefits due to back pain, foot problems, female problems and headaches, was found not disabled within the meaning of the Social Security Act by the Secretary. The only issue before this Court is whether the Secretary's decision that plaintiff is not disabled within the meaning of the Act is supported by substantial record evidence.

The Administrative Law Judge (ALJ) concluded that plaintiff has not been under a disability within the meaning of the Social Security Act at any time through the date of the ALJ's decision. (Tr. 22, 23)

The Appeals Council denied plaintiff's request for review of the ALJ's decision May 20, 1992, making the ALJ's decision the final decision of the Secretary. (Tr. 4–5)

Plaintiff timely filed the instant complaint in this Court.

After consideration of the record as a whole, the Court finds the decision of the Secretary is supported by substantial evidence.

Plaintiff, who was 42 at the time of the hearing, went through the fifth grade. (Tr. 39) She has past relevant work as a waitress, cook, nurse's aide, janitor, machine operator and truck driver. (Tr. 22)

The ALJ considered plaintiff's impairments by way of the five–step sequential evaluation process.

The first step involves a determination of whether the claimant is involved in substantial gainful activity. 20 C.F.R.

§ 404.1520 (b). If the claimant is, benefits are denied; if not, the evaluation goes to the next step.

Step 2 involves a determination, based solely on the medical evidence, of whether the claimant has a severe impairment or combination of impairments. Id. at § 404.1520 (c); see 20 C.F.R. § 404.1526. If not, benefits are denied; if so, the evaluation proceeds to the next step.

Step 3 involves a determination, again based solely on the medical evidence, of whether the severe impairment(s) meets or equals a listed impairment which is presumed to be disabling. Id. at § 404.1520 (d). If so, benefits are awarded; if not, the evaluation continues.

Step 4 involves a determination of whether the claimant has sufficient residual functional capacity, despite the impairment(s), to perform past work. Id. at § 404.1520 (e). If so, benefits are denied; if not, the evaluation continues.

Step 5 involves a determination of whether the claimant is able to perform other substantial and gainful work within the economy, given the claimant's age, education and work experience. Id. at § 404.1520 (f). If so, benefits are denied; if not, benefits are awarded.

At step 4, the ALJ found that plaintiff did not have the residual functional capacity to perform her past relevant work. The ALJ correctly noted that, once claimant was determined to be unable to perform past relevant work, the burden shifts to the Secretary to show a significant number of jobs within the economy, given claimant's residual functional capacity, age, education and past work.

In reaching his conclusion, the ALJ called a vocational expert witness and asked him a series of hypothetical questions: given plaintiff's residual functional capacity and vocational profile, would there be jobs she could perform if the ALJ found all of her subjective complaints to be credible? (Tr. 52) (No) If she had the restrictions placed on her by Dr. Smith (Social Security consultant)? (Tr. 53) (Yes, same jobs)

If a shortness of breath restriction were added? (Tr. 54–55) (Yes)

Plaintiff complains that the hypotheticals were flawed because they didn't include plaintiff's mental problems. It is well settled that a hypothethical question posed to a vocational expert must fully set forth a claimant's impairments. E.g., Totz v. Sullivan, 961 F. 2d 727, 730 (8th Cir. 1992). The Court is unpersuaded, however, that the ALJ committed reversible error by not adding a mental impairment to his hypothetical questions. Plaintiff's attorney was asked by the ALJ if there were any other restrictions that should be added. (Tr. 55–56) Although he had the opportunity to rectify any omission, he did not do so. Plaintiff cannot now be heard to complain about an omission that plaintiff failed to cure.

Furthermore, the Court is not convinced that a mental health restriction should have been added to the hypotheticals. It is significant that plaintiff did not allege a disabling mental impairment in her application for disability benefits, see, Smith v. Shalala, 987 F. 2d 1371, 1375 (8th Cir. 1993), did not offer it at the hearing as a basis for disability, Brockman v. Sullivan, 987 F. 2d 1344, 1348 (8th Cir. 1993); see, Matthews v. Bowen, 879 F. 2d 422, 424 (8th Cir. 1989) (claimant did not allege disability due to mental impairment and presented only minimal evidence of anxiety) and had not sought or been referred for mental health treatment for over a decade. See, Smith v. Shalala, 987 F. 2d 1371, 1375 (8th Cir. 1993), citing, Johnson v. Bowen, 866 F. 2d 274, 275 (8th Cir. 1989) and Benskin v. Bowen, 830 F. 2d 878, 884 (8th Cir. 1987).

Plaintiff testified that her nerves bothered her, for which she took medicine (Tr. 42) and that she had seen a psychiatrist (Tr. 43) in Texas in 1978 or '79 (Tr. 46).

Plaintiff also argues that the ALJ's credibility analysis was insufficient. The ALJ evaluated plaintiff's subjective

complaints in light of Polaski v. Heckler, 739 F. 2d 1320 (8th Cir. 1984), and found they lacked credibility. (Tr. 22)

As the ALJ noted, despite her back hurting "constantly," with pain at ten on a scale of ten 99% of the time (Tr. 40), and with "severe headaches" that "never go away" (Tr. 41), she saw a physician only twice in 1990 (the year she alleged his [sic] disability began), once for vaginal bleeding and once for weight control. (Tr. 126)

Given the lack of objective medical support for her claims, her lack of treatment, her poor work record and her daily activities, the ALJ could properly discount plaintiff's subjective complaints. See, Thomas v. Sullivan, 928 F. 2d 255, 259– 60 (8th Cir. 1991); Cabrnock v. Bowen, 881 F. 2d 561, 564 (8th Cir. 1989).

This Court should not disturb the decision of any ALJ who seriously considers, but for good reasons explicitly discredits, a claimant's testimony of disabling pain. See, Reed v. Sullivan, 988 F. 2d 812, 815 (8th Cir. 1993).

Plaintiff makes much of the report of Dr. Fowler diagnosing multiple mental problems. (Tr. 158–70) His report was completed after both the hearing and the ALJ's decision. It was a one–time consultation done for the express purpose of the Social Security determination. (Tr. 158) It is based for the most part upon plaintiff's symptoms as related to the doctor by the plaintiff. Given that it is irreconcilable with the records of Drs. Ducker and Benton, plaintiff's treating physicians, it would be entitled to little, if any, weight. The report of a consulting physician who examined the claimant once does not constitute substantial evidence upon the record as a whole, especially when contradicted by the claimant's treating physician. Henderson v. Sullivan, 930 F. 2d 19, 21 (8th Cir. 1991).

We have consistently discounted the opinions of non–treating physicians who have seen the patient only once, at the request of the Social Security Administration. There is no reason to treat differently the opinion of a non–treating

physician who has seen the patient only once, at the request of the patient or her lawyer. Henderson v. Sullivan, 930 F. 2d 19, 21 (8th Cir. 1991).

Plaintiff has advanced other arguments, which the Court has carefully considered, and found to be without merit.

There is ample support in the record as a whole that "a reasonable mind might accept as adequate to support [the] conclusion" of the ALJ in this case. Richardson v. Perales, supra, at 401; see also, Robertson v. Sullivan, 925 F. 2d 1124, 1126–27 (8th Cir. 1991).

THEREFORE, the Court hereby grants defendant's motion for summary judgment, denies plaintiff's motion for summary judgment, affirms the final determination of the Secretary and dismisses plaintiff's complaint with prejudice.

IT IS SO ORDERED.

DATED this 23 day of June, 1993.

/s/ H. David Young
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

Refer to: S3GC9
430–13–1477

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Flora M. Sullins
Box 271
Salem, AR 72576

Dear Ms. Sullins:

The request for review of the Administrative Law Judge's decision in your case has been considered.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence

currently of record. (These provisions are contained in 20 CFR 404.970 for Social Security claims under Title II of the Social Security Act and in 20 CFR 416.1470 for Supplemental Security Income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case. In reaching this conclusion, the Appeals Council considered the office notes from Dr. David Ducker, but decided that this additional evidence did not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided in section 205 (g) of the Social Security Act, as amended (42 U.S.C. 405 (g)) for claims under Title II and in section 1631 (c) (3) of the Act (42 U.S.C. 1383 (c) (3)) for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See rules 4 (c) (2) and (d) (4) and (5) of the Federal Rules of Civil

Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

The Appeals Council has considered the report, dated October 12, 1991, you submitted from W. Gerald Fowler, M.D. concerning your mental impairment. The Appeals Council notes that the Administrative Law Judge ruled on the issue of disability in your case only through September 25, 1991, that is, the date of his decision, and that the information provided by Dr. Fowler is not relevant to the issue of whether you were disabled on or before September 25, 1991. If you wish to receive a determination on the issue of disability after that date, you will need to file new applications. We are returning Dr. Fowler's report to you to submit in support of the new claims. If you file a new claim for supplemental security income within 60 days after you receive this notice, the request for review you filed on September 30, 1991, will serve to protect the filing date to assure that all potential benefits would be payable if your new claim leads to an award. A new title II claim filed within 6 months after you receive this notice will also have a protective filing date of September 25, 1991.

Sincerely yours,

ORIGINAL SIGNED BY
W. Stephen Hubbard
Administrative Appeals Judge

cc:
Anthony W. Bartels, Esq.
HO, Little Rock, AR (ALJ Brewer)

APPENDIX D

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF

Flora M. Sullins
(Claimant)

CLAIM FOR

Period of Disability, Disability
Insurance Benefits, and Supplemental
Security Income

430–13–1477
(Social Security Number)

The claimant filed an application for disability insurance and a period of disability and supplemental security income on November 9, 1990 alleging an inability to work due to back pain, headaches and "female problems". Her applications were denied initially and upon reconsideration. At the claimant's request a hearing was held on July 26, 1991 in Batesville, Arkansas. The claimant appeared and testified. She was represented by the Honorable Anthony Bartels, Attorney at Law. Also appearing and testifying was Mr. Jerry Miller, a vocational expert.

The issue is whether the claimant is disabled within the meaning of the Social Security Act and entitled to a period of

disability and disability insurance benefits under Sections 216 (i) and 223, respectively of the Social Security Act and whether the claimant is disabled under Section 1614 (a) (3) (A). Disability is defined as the inability to engage in any substantial gainful activity due to a physical or mental impairment which can be expected to either result in death or last for a continuous period of not less than twelve months. Social Security Regulations No. 4 and No. 16 provide for a sequential evaluation in determining disability. Further, the Regulations require utilization of a special procedure in evaluating the severity of mental impairments.

The claimant alleges disability due to chronic low back pain, headaches, "female problems" and depression. While the claimant's impairments are severe, the medical evidence does not document an impairment or combination of impairments of sufficient severity so as to meet or equal a listed impairment.

Dr. Lopez found that the claimant was precluded from prolonged sitting, standing, walking, and climbing. Dr. Smith found that the claimant should avoid standing for long periods and heavy lifting. Therefore the claimant is precluded from engaging in her past relevant work. Thus, the claimant's residual functional capacity must be determined in light of her impairments.

The claimant is a 42 year old woman with a fifth grade education. She testified she can read and write. She has past relevant work experience as a waitress, cook, nurse's aide, janitor, machine operator and truck driver. The claimant testified that she has constant pain in her low back with inability to sit, stand, walk or lift without increased pain. On a scale of one to ten the claimant testified her pain was at level ten 99% of the time. In addition, the claimant testified

that she has headaches, breathing problems, numbness in her arms and legs, foot pain and nervousness.

The record reflects the claimant suffered an acute lumbosacral sprain in 1982 and 1988 treated with medication and rest. X-rays of the lumbar spine in 1988 revealed vertebral bodies to be intact. There was no evidence of spondylosis or spondylolisthesis. Intervertebral disc spaces were adequately maintained. The claimant was seen on two occasions in 1990. Once with a complaint of vaginal bleeding on September 1, 1990 and again on September 28, 1990 requesting weight control. A general consultative examination performed by Dr. Smith in January 1991 revealed the claimant had normal breath sounds. Her heart had a regular rate and rhythm without murmurs, gallops or rubs. She had no significant limitation of motion in her cervical or lumbar spines and she had full range of motion of her upper and lower extremities with no evidence of any heat or swelling. Cranial nerves were intact. Her reflexes were normal and equal bilaterally. There was no muscle weakness, muscle atrophy or sensory abnormalities noted. The claimant could stand and walk without assistive devices, could walk on her heels and toes and could squat and arise from a squatting position. X-rays of the lumbosacral spine revealed very minimal early arthritic changes with lipping. X-rays of both feet appeared to be within normal limits. Because of the claimant's history of back injury while lifting patients as a nurse's aide, Dr. Smith reported prolonged standing or heavy lifting was contraindicated. However, he felt the claimant was able to work at a number of occupations. Dr. Smith reported the claimant had no problems with sitting and that she could carry and lift up to twenty pounds with proper instructions in methods of lifting and carrying (Exhibit 19). In May 1991 Dr. Grasse saw the claimant for her complaints of headache, backache and depression. Three x-rays of the lumbar spine

revealed no evidence of recent bone injury. Interspaces were well maintained. Vertebral bodies were of average height. Ultrasound revealed averaged size ovaries, poorly defined uterine corpus and increasing echogenicity of the lower abdomen. The claimant's pap smear was normal (Exhibit 22).

Dr. Ramon E. Lopez is a Board Certified Orthopedic Surgeon to whom the claimant was referred by her attorney and whose report is of record (Exhibit 20). Dr. Lopez reports that the claimant is unable to engage in work activities which require prolonged sitting, standing, walking, climbing, carrying, pushing or pulling. Apparently this report is based almost entirely on the claimant's own subjective complaints since he found no restriction of motion of the claimant's cervical and lumbar spines. On examination of the rest of the musculoskeletal system including her shoulders, elbows, wrists, hips, knees, ankles and feet was unremarkable with no areas of pain, tenderness, swelling or redness. There were no demonstrable weaknesses, leg length discrepancy or measurable atrophy. Reflexes were normal and equal bilaterally. The claimant was able to make a fist, pinch, grasp and there was no weakness of her hands. X–rays of the lumbar spine were within normal limits. The claimant has alleged severe disabling pain and has alleged numerous aggravating factors and functional restriction including an inability to sit, stand, walk or lift. Admittedly, allegations of pain by the claimant may not be disregarded solely because they are not fully corroborated by objective medical findings typically associated with pain. However, such lack of corroboration should be considered in deciding the issue of credibility along with other factors. The Administrative Law Judge has considered these allegations in accordance with the criteria set forth in Polaski v. Heckler, 751 F. 2d 943 (8th Cir. 1984). The claimant testified she had pain at a level of ten 99% of the time. If found to be credible

the claimant would require continuous care and medication for her pain and it would have no doubt precluded her attendance at the hearing. The claimant demonstrated no obvious signs of a physical impairment at the hearing. She retains adequate mobility and use of her upper and lower extremities. She has received no definitive treatment for her musculoskeletal complaints and she takes a minimal amount of medication for pain. X–rays of the lumbar spine are unremarkable. Nor is there any evidence of any serious musculoskeletal weakness, atrophy, sensory loss or other progressive physical deterioration usually seen as an indication of severe pain or inactivity for prolonged periods of time. The claimant has complained of problems with headaches. However, they are not shown to be so frequent or so severe that they would preclude work activity. She also complained of problems with shortness of breath. Mrs. Sullins has received no treatment for a respiratory impairment and is taking no medication for same. She has not been hospitalized or seen in an emergency room for a respiratory impairment. Further, her shortness of breath could be improved with the cessation of smoking. She has also alleged foot problems with pain and swelling. However, physical examination revealed no evidence of swelling and x–rays of both feet were normal. The claimant has been advised by two separate doctors that she needs to have a hysterectomy. However, this problem would not last in disabling proportions for a period of more than 12 months with treatment. The claimant testified that she has problems with anxiety and depression. However, there are no signs or symptoms of an ongoing psychiatric impairment. There is also no showing that the claimant alleged any difficulty with her nerves when she was examined by any of her treating physicians, nor is there a record of a mental impairment being identified or considered for diagnosis or treatment. There is no showing that she had been seen by a mental health professional or been hospitalized for a psychiatric

impairment. The claimant testified she took Amitriptyline for her nerves; however, this medication was in fact prescribed for her alleged headaches. No side effects from her medications are alleged or established. Her level of medical treatment is totally inconsistent with the severity of her allegations and her work history does not enhance her credibility. The claimant has worked sporadically and never made more than $5,000.00 in any given year. It also appears that her current level of activity is not substantially different from her pattern of daily living prior to February 1990. The claimant was alert and responsive. She appeared to be reasonably intelligent and she did not demonstrate poor memory, poor concentration or poor coordination. The claimant's difficulties have resolved well with treatment and medication during times of exacerbation and for the most part the claimant has been maintained fairly stable on appropriate medication and follow–up.

In view of her history of previous back injuries from lifting patients as a nurse's aide, the claimant was advised to avoid those activities which aggravate her back pain. Based on her own account of precipitating factors the claimant was advised to avoid heavy lifting or standing for prolonged periods of time.

According to Dr. Smith, the claimant has no difficulty sitting and she can lift and carry objects weighing up to twenty pounds with proper instructions in methods of lifting. Even Dr. Lopez says she must only avoid prolonged sitting, standing, lifting, stooping and climbing. He does not say she cannot do these things in moderation. Mr. Miller, a vocational expert, was present at the hearing. According to Mr. Miller, the claimant's past relevant work ranged from light to heavy, unskilled to semi–skilled in nature. Her jobs as a janitor, sewing machine operator and waitress were light and unskilled. Her job as a nurse's aid was heavy and

semi–skilled. The only skills that could be transferred to lighter work were those of a nurse's aide. However, such a transfer is precluded in this case by the claimant's limited education.

When asked whether a person with the claimant's age, education, previous work experience who must avoid prolonged standing, sitting, walking, and climbing could perform the claimant's past relevant work, Mr. Miller said that they could not. However, he testified that those same limitations would not preclude other work. He listed several unskilled occupations where the claimant could alternately sit and stand. Such jobs included assembly line jobs at the White–Rodgers plant in Batesville and Emerson Electric, along with numerous cashier jobs. Over five hundred such jobs exist at the White–Rodgers and Emerson Electric plant. Dr. Smith's assessment is much less restrictive and would permit the performance of all sedentary work. The vocational expert also testified that the above mentioned jobs were relatively free of pollutants and required very little walking. Consequently, it is the decision of the Administrative Law Judge that the claimant is not disabled within the meaning of the Social Security Act.

FINDINGS

After consideration of the record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on February 15, 1990, the date the claimant stated she became unable to work, and continued to meet them through June 30, 1990 but not thereafter.

2. The claimant has not engaged in substantial gainful activity since February 15, 1990.

3. The medical evidence establishes that the claimant has a chronic lumbosacral sprain, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's testimony regarding her pain and the resulting functional limitations are not found to be credible.

5. The claimant has the residual functional capacity to perform the physical exertion requirements of work except for heavy lifting or standing, sitting, walking or climbing for prolonged periods of time (20 CFR 404.1545 and 416.945).

6. The claimant is unable to perform her past relevant work as a waitress, cook, nurse's aid, janitor, machine operator and truck driver.

7. The claimant is 42 years old, which is defined as a younger individual (20 CFR 404.1563 and 416.963).

8. The claimant has a fifth grade education. She is able to read and write (20 CFR 404.1564 and 416.964.

9. Although the issue of transferability of work skills is not material, the claimant has no transferable skills.

10. When considering the claimant's age, education, previous work experience and residual functional capacity, the vocational expert testified that jobs still exist in significant numbers that the claimant can perform. Examples of such jobs were: Assembly line worker and cashier. It should be noted that the claimant would be able to perform these jobs even if she experienced mild to

moderate pain and she would have the option to sit and stand at will.

11. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520 (f) and 416.920 (f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on November 9, 1990, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216 (i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614 (a) (3) (A) of the Act.

/s/ Garry L. Brewer
GARRY L. BREWER
Administrative Law Judge

25 SEP 1991
Date

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93–2729

Flora Sullins,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
v.	*	Rehearing and
	*	Suggestion for
Donna E. Shalala,	*	Rehearing En Banc
Secretary of the	*	
Department of Health	*	
and Human Services,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 23, 1994

Order Entered at the Direction of the court:

/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 94-520

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORA SULLINS, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

After an administrative law judge denied petitioner's application for disability insurance benefits and supplementary security income benefits, petitioner submitted new evidence to the Appeals Council. The Appeals Council considered the evidence but denied further review. The question presented is whether, in light of the new evidence, substantial evidence supports the Secretary's decision to deny benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-520

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DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 25 F.3d 601. The opinion of the district court (Pet. App. 9a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1994. A petition for rehearing was denied on June 23, 1994. Pet. App. 27a. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following initial denial of an application for disability benefits or supplemental security income benefits under the Social Security Act, the applicant may request a hearing before an administrative law judge (ALJ). 20 C.F.R. 404.900(a)(3), 416.1400(a)(3). If the ALJ denies benefits, the applicant may then petition the Appeals Council for review of the ALJ's decision. 20 C.F.R. 404.900(a)(4), 404.970, 416.1400(a)(4), 416.1470.

The regulation states that the Appeals Council will review a case if:

> (1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest.

20 C.F.R. 404.970(a), 416.1470(a). In addition, if the applicant submits "new and material evidence" in support of her petition for review, the Appeals Council "shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. 404.970(b), 416.1470(b). The Appeals Council "shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record." 20 C.F.R. 404.970(b); see 20 C.F.R. 416.1470(b).

When the Appeals Council grants review, the Appeals Council's decision constitutes the "final decision of the Secretary" for purposes of judicial review under 42 U.S.C. 405(g). When the Appeals Council denies review of the ALJ's decision, the decision of the ALJ becomes the final decision of the Secretary for purposes of judicial review. See 20 C.F.R. 404.955(b), 404.981, 416.1455(b), 416.1481. In either event, the reviewing court determines whether the Secretary's decision is supported by substantial evidence in the administrative record as a whole. 42 U.S.C. 405(g); see, *e.g.*, *Smith* v. *Heckler*, 735 F.2d 312, 315 (8th Cir. 1984).

2. In November 1990, petitioner applied for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, and supplemental security income (SSI) benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, alleging that she became disabled on February 15, 1990, due to back pain, headaches, foot and "female problems." Pet. App. 2a, 18a. Petitioner did not allege any disabling mental impairments in her application for disability benefits. *Id.* at 6a-7a. Petitioner's claims were denied initially and upon reconsideration. *Id.* at 2a.

3. Petitioner requested a hearing before an ALJ. In a decision dated September 25, 1991, the ALJ concluded that petitioner was not disabled. Pet. App. 18a-26a. The ALJ found that petitioner had not engaged in substantial gainful activity since February 15, 1990, and last met the disability insured status requirements under Title II of the Social Security Act on June 30, 1990. Pet. App. 24a. At the ALJ hearing, petitioner testified regarding several ailments, including back pain, headaches, shortness of breath, numbness in her arms and legs, foot pain, anxiety and depression. *Id.* at 19a-22a. Based on the testimony of petitioner and a vocational expert, as

well as the medical assessments offered by petitioner's treating physicians and consulting specialists, the ALJ concluded that the medical evidence did not establish a disabling physical impairment, *id.* at 25a, or any symptoms or diagnosis of a mental impairment, *id.* at 22a. Based on the vocational expert's testimony that petitioner retained residual functional capacity to work as an assembly line worker or cashier, the ALJ concluded that petitioner was not disabled at any time through the date of his decision, September 25, 1991. *Id.* at 25a-26a.

4. On October 12, 1991, approximately three weeks after the ALJ's decision finding petitioner not disabled, petitioner was examined by a psychiatrist, Dr. Gerald Fowler. Dr. Fowler expressed the view that petitioner suffered from several mental impairments, that the impairments "had not improved significantly within the past 12 months," and that her condition was not expected to improve within the next year. See Pet. App. 3a, 7a n.5. Petitioner submitted Dr. Fowler's psychiatric report to the Appeals Council in support of her request that it review the ALJ's decision. *Id.* at 17a.

The Appeals Council considered Dr. Fowler's report along with additional office notes provided by one of petitioner's treating physicians, but concluded that there was no basis under the 20 C.F.R. 404.970(a) criteria (quoted at page 2, *supra*) for granting review of the ALJ's decision. Pet. App. 16a-17a. The Appeals Council found that "the information provided by Dr. Fowler [was] not relevant to the issue of whether [petitioner was] disabled on or before September 25, 1991," the date of the ALJ's decision. *Id.* at 17a.[1]

---

[1] The Appeals Council noted that petitioner could request a determination on the issue of disability after September 25, 1991 by

5. The district court affirmed the Secretary's final decision, Pet. App. 9a-14a, holding that there was ample support in the record for the ALJ's conclusion that petitioner was not disabled within the meaning of the Act. *Id.* at 14a. The district court considered the new evidence petitioner had submitted to the Appeals Council, but declined to give weight to Dr. Fowler's psychiatric report because the report was based on a one-time consultation undertaken by Dr. Fowler specifically in connection with the benefits determination, it consisted largely of petitioner's recitation of her symptoms, and it was irreconcilable with the records of petitioner's treating physicians. *Id.* at 13a-14a.

6. The court of appeals affirmed the district court's decision. Pet. App. 1a-8a. Petitioner contended that the ALJ's decision should be reversed because it was not supported by substantial evidence. In the alternative, petitioner requested that the court remand the case with instructions to obtain vocational expert testimony that would take into account her alleged mental impairments, including the post-ALJ decision submission of Dr. Fowler. *Id.* at 4a. [2]

The court of appeals rejected those contentions. The court concluded that substantial evidence supported the ALJ's determination that petitioner's subjective com-

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filing a new application, and that she could submit Dr. Fowler's report in support of such a claim. Pet. App. 17a. We have been informed by the Department of Health and Human Services that petitioner filed a new application for SSI benefits on July 1, 1993, which the Secretary granted, and that she has been receiving benefits since December 14, 1993.

[2] Petitioner stated in her brief that "the *severity* of [her] mental condition did not come to light until three months *after* the administrative hearing when claimant saw Dr. Fowler." Appellant's C.A. Br. 25.

plaints of pain were not credible. Pet. App. 4a-6a. The court also held that the ALJ did not err in failing to include a hypothetical question to the vocational expert that took into account petitioner's alleged mental impairments. *Id.* at 6a-8a. The court found it significant that there were no signs or symptoms of an ongoing psychiatric impairment in any of her medical records, that there was no showing that she was diagnosed with or received treatment for a psychiatric impairment by either a mental health professional or one of her treating physicians, and that petitioner did not allege a disabling mental impairment in her application or offer such an impairment as a basis for disability at the ALJ hearing. *Id.* at 7a. The court also noted that Dr. Fowler's consultative report, which suggested at least a current mental impairment, was not part of the medical record before the ALJ and that "[a]n ALJ ordinarily has no obligation to investigate claims not presented at the time of the application for benefits and not offered at the hearing as a basis of disability." *Id.* at 7a-8a. Indeed, the court observed that when formulating the hypothetical, the ALJ "specifically asked [petitioner's] attorney whether he had covered all of the factors relevant to [petitioner's] ability to perform other work. Neither [petitioner] nor her attorney raised the issue of mental impairments." *Id.* at 6a n.2.

On June 23, 1994, the court of appeals denied rehearing and rehearing en banc. Pet. App. 27a.

ARGUMENT

1. Petitioner concedes that, because the Appeals Council declined to review the ALJ's decision, the ALJ's decision constituted the "final decision" of the Secretary for purposes of judicial review under 42 U.S.C. 405(g). Petitioner also concedes (Pet. 6-7) that she did not

submit Dr. Fowler's report until after the ALJ rendered his decision. She nevertheless contends that in reviewing the ALJ's decision to determine whether it was supported by substantial evidence, the district court was required to consider Dr. Fowler's report along with the evidence that was before the ALJ. That contention is incorrect. Although several courts of appeals (including the Eighth Circuit in prior cases) have agreed with petitioner's position, the issue does not warrant review by this Court here.

As petitioner points out (Pet. 9-11), under Eighth Circuit precedent, when a claimant submits new evidence to the Appeals Council pursuant to 20 C.F.R. 404.970(b) after the ALJ has rendered a decision, and the Appeals Council considers the evidence but declines to review the case, the reviewing court is to determine "whether the administrative law judge's determination is supported by substantial evidence on the record as a whole, including the new evidence submitted after the determination was made." *Riley* v. *Shalala*, 18 F.3d 619, 622 (8th Cir. 1994); see also *Nelson* v. *Sullivan*, 966 F.2d 363, 366 (8th Cir. 1992) ("If, as here, the Appeals Council considers the new evidence but declines to review the case, we review the ALJ's decision and determine whether there is substantial evidence in the administrative record, which now includes the new evidence, to support the ALJ's decision."); *Browning* v. *Sullivan*, 958 F.2d 817, 823 (8th Cir. 1992) (same).

Petitioner supports the approach followed by the Eighth Circuit, but contends that it was not followed in this case. In fact, however, her claim was correctly rejected by the district court under that approach. Petitioner submitted new evidence to the Appeals Council three months after her ALJ hearing and about three weeks after the ALJ had rendered a decision. The

Appeals Council considered the report submitted by Dr. Fowler. Pet. App. 17a. Even though the Appeals Council concluded that the new evidence was not relevant to the time period preceding the ALJ's decision, the district court, in accordance with Eighth Circuit precedent, considered the new evidence as part of the record as a whole. After weighing all of the evidence of record, and specifically evaluating the new evidence, the district court concluded that substantial evidence still supported the ALJ's decision to deny benefits. Pet. App. 14a.

The court of appeals affirmed the district court's decision, Pet. App. 1a-8a, specifically noting the district court's determination that substantial evidence on the record as a whole supported the ALJ's finding that petitioner was not disabled, *id.* at 4a. It noted that Dr. Fowler's evidence had not been submitted to the ALJ. *Id.* at 7a-8a. Petitioner argues (Pet. 11-12, 14-15) that, under Eighth Circuit precedent, the panel should have weighed that evidence in deciding whether the ALJ's decision was supported by substantial evidence on the record as a whole. The panel, however, did not expressly depart from the Eighth Circuit decisions relied upon by the petitioner and quoted above; it did not cite those decisions, did not advert to the fact that Dr. Fowler's report was submitted to the Appeals Council, and did not discuss the legal significance of such a submission. See Pet. App. 3a-4a, 7a-8a. The decision below, therefore, does not, on its face, conflict with Eighth Circuit precedent, and such an intra-circuit conflict would not, in any event, warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[3]

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[3] The court of appeals concluded that petitioner did not produce evidence that she suffered fron a mental impairment prior to June 30, 1990, the date she last met the special earnings

2. Petitioner argues (Pet. 9, 11, 14) that the court of appeals' decision conflicts not only with previous decisions of the Eighth Circuit, but also with decisions of the Fourth and Eleventh Circuits, which similarly hold that the reviewing court should weigh evidence that was considered by the Appeals Council, even when the Appeals Council denies review. See *Keeton* v. *DHHS*, 21 F.3d 1064, 1067 (11th Cir. 1994); *Wilkins* v. *DHHS*, 953 F.2d 93, 96 (4th Cir. 1991). In contrast, the Seventh and Sixth Circuits have held, in accordance with the position of the Secretary, that a reviewing court may not reverse

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requirements for disability beneifts. Pet. App. 6a, 8a. Dr. Fowler did not conduct his examination until October 12, 1991, fifteen months after that date. *Id.* at 3a. His assessment was based on petitioner's description of her past life and limited diagnostic tests. The diagnostic tests did not include more comprehensive testing (*e.g.*, IQ tests, Minnesota Multiphasic Personality Inventory, etc.) that might have related to the period at issue in the final decision of the Secretary. The report did not elaborate on or specifically address any mental impairment existing prior to June 30, 1990. *Ibid.*

With respect to her claim for SSI benefits, the ALJ concluded that substantial evidence in the record did not support a finding of any type of disability "at any time through the date of this decision," which was September 25, 1991. Pet. App. 26a. The Appeals Council concluded that Dr. Fowler's report was not relevant to the question of petitioner's disability prior to that date. *Id.* at 17a. Dr. Fowler's report indicated that petitioner's condition, as described by him in the report, had not improved in the preceding twelve months. *Id.* at 3a. Consequently, his report could be construed as relevant to the time period preceding the ALJ's decision. The district court considered Dr. Fowler's report in detail and concluded that the report did not alter its conclusion that substantial evidence supported the ALJ's decision denying all benefits through September 25, 1991. *Id.* at 13a-14a. In her petition for certiorari, petitioner has presented no distinct question concerning her eligibility for SSI benefits.

an ALJ's decision based on evidence first submitted to the Appeals Council. *Eads* v. *DHHS*, 983 F.2d 815, 817-818 (7th Cir. 1993); *Cotton* v. *Sullivan*, 2 F.3d 692, 695-696 (6th Cir. 1993) (discussing *Eads*). Because this case arose in the Eighth Circuit, where a contrary rule is well established—and because the panel in this case did not specifically address the issue—this would not be an appropriate case for consideration of the issue by the Court.

We note as well that the extent to which the Appeals Council considers evidence submitted to it in the first instance is a matter that can be conclusively resolved by regulation. Indeed, in September 1994, the Commissioner of Social Security released a study and proposal for restructuring of the administrative process for review of disability claims. Social Security Admin., U.S. Dep't of Health and Human Services, Pub. No. 01-005, *Plan for a New Disability Claim Process* (1994), *reprinted at* 59 Fed. Reg. 47,887 (Sept. 18, 1994). The proposal suggests a revised role for the Appeals Council, and contemplates that the Appeals Council's review of an individual case, to the extent it chooses to review the case, will be limited to the record that was before the ALJ. See *id.* at 35-36. Review by this Court of an issue concerning that particular aspect of the existing process is unwarranted while the restructuring is under consideration. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991); *Richardson* v. *Wright*, 405 U.S. 209, 209 (1972).

Moreover, in this case, the district court did consider Dr. Fowler's report in holding that the ALJ's decision was supported by substantial evidence. Pet. App. 13a-14a. Dr. Fowler's report was prepared more than fifteen months after petitioner last was insured under Title II of the Act, and she is currently receiving SSI benefits

under Title XVI. See note 1, *supra*. Thus, the particular circumstances of this case likewise do not suggest an occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1994